THE HISTORY OF THE REGISTER OF ORIGINAL WRITS.

II.

IN a former number of this REVIEW I have been permitted to draw attention to some materials for the early history of our common law which have been too long neglected, namely, ancient Registers of Original Writs. I then described two such Registers. One of them (which I refer to as Hib.) seems to be the Register that was sent to Ireland by royal order in 1227; while the other (which I call CA.) seems to be of almost even date, to be, that is, some forty years younger than Glanvill's, some thirty years older than Bracton's, treatise.

When we compare these two Registers together, the first remark that occurs to us is, that in substance they are very similar, while in arrangement they are dissimilar. From this we may draw the inference that the official Register in the Chancery had not yet crystallized; or, to put the matter in another way, that very possibly different officers in the Chancery had copies which differed from each other. Indeed, the official Register of the time may not have taken the shape of a book, but may have consisted of a number of small strips of parchment filed together and easily transposed. There is a certain agreement between them even in arrangement. Both have "Right" in the forefront, and occasionally give us the same writs in the same order. One instance of such correspondence is worthy of note, for it will become of interest to us hereafter. The following seems to be, for some reason or another, an established sequence: *De nativo habendo*, *De libertate probanda*, *De rationalibus divisis*, *De superoneratione pasturæ*, Replevin, *De pace regis infracta* (writs for the arrest or attachment of appellees), *De homine replegiando*, Services and Customs. Traces of this sequence will be found even when the Register, having increased in bulk fifty times over, gets printed in the Tudor days. The writs are arranging themselves in groups: a Writ of Right cluster, an Ecclesiastical cluster, a Liberty and Replevin

cluster. But many questions are very open. Shall the Writs of Entry precede or follow the Assizes? Shall they be deemed proprietary or possessory?

Taking our two Registers together, we can form an idea of the writs which were "of course" in the early years of Henry III.; and these we may contrast with the writs which Glanvill gives us from the last years of Henry II. On the whole, we can record a distinct advance of royal justice; but there have been checks and retrogressions. The Writ of Right, properly so called, the *Breve de recto tenendo*, which commands the feudal lord to do justice, has taken the place of the simple *Precipe quod reddat* as the normal commencement of a proprietary action for land. This is a victory of feudalism consecrated by the Great Charter. Again, in Glanvill's day the jurisdiction over testamentary causes had not yet finally lapsed into the hands of the church; twice (vii., 7, xii., 17) he gives us a writ (*quod stare facias rationabilem divisam*) whereby the sheriff is directed to uphold the will of a testator. This writ we miss in the Registers; the state has had to retreat before the church. We are so apt to believe that in the history of the law all has been for the best, that it is well for us to notice this unfortunate defeat, — for unfortunate it assuredly was, and to this day we suffer the evil consequences which followed from the abandonment by the king's courts of all claim to interfere with the distribution of a dead man's chattels. On the other hand, we see that the triumph of feudalism is more apparent than real; it has barred the high road, but royal justice is making a flank march. Glanvill (x., 9) has a writ which lies for a mortgagor against a mortgagee; or, rather, we ought to say for a gagor against a gagee, when the term for which the land was gaged has expired. The alteration of a few words in this will turn it into a writ of entry *ad terminum qui præteriit*.[1] Such a writ of entry is given by our two Registers, and they also give the writ *cui in vita* applicable for the recovery of land alienated by a married woman. Curiously enough they do not give the writ of entry *sur disseisin;* though we happen to know that already in 1205 this writ, lying for a disseisee against the heir of the disseisor, had been made a writ

[1] The development can be seen in Palgrave's Rot. Cur. Reg., i., 341, "in quam non habuit ingressum nisi quia predicta B. ei commisit ad terminum qui preteriit;" ii., 37, "quam pater A. invadiavit B. ad terminum qui preteriit;" ii., 211, "quam ipse invadiavit C. patri predicti B. ad terminum qui preteriit," etc.

of course.[1] This is by no means the only sign that the copies of the Register which got into circulation did not always contain the newest improvements. Still, here we see that a foundation has been laid for that intricate structure of writs of entry which will soon be reared. It is very doubtful whether Glanvill knew the procedure by way of attaint for reversing the false verdict of a petty assize; but we find this securely established in our Registers.

Another noteworthy advance is to be seen in the actions which we may call contractual. The *Warrantia Cartæ* is in use, and so is the Writ of Covenant. We may doubt whether there is as yet any writ as of course which will enforce a covenant not touching land. The typical covenant of the time is what we should call a lease; but Glanvill (x., 8) told us that the king's court was not in the habit of enforcing "*privatas conventiones*" agreements, that is, not made in its presence and unaccompanied by delivery of possession. Debt and Detinue are still provided for chiefly by writs of *Justicies*, directing trial in the county court. "Debt in the Bench" seems, as yet, no writ of course, and the Irish Register shows us that, at least across St. George's Channel, one had to pay heavily even for a *Justicies*. The excuse for such exaction, of course, was that no writ was necessary for the recovery of a debt in a local court; royal interference was a luxury. Lastly, we will notice that, as yet, we hear nothing of Account and nothing of Trespass.

The next Register that I shall put in is found in a Cambridge MS. I shall hereafter refer to it as CB. (kk., v. 33). Like the last, it is bound up with a Glanvill, and this, I may remark, is in favor of its antiquity. Edwardian Registers are generally accompanied, not by Glanvill, but by Hengham, or Fet Assavoir or Statutes. On the whole, we may, as I believe, safely attribute this specimen to the middle part of Henry III.'s reign, to the period between the Statute of Merton (1236) and the Statute of Marlborough (1267), and I am inclined to think it older than the Provisions of Westminster (1259). In the following notes of its contents I will give references to the "Pre-Mertonian" Register CA., which I described on a former occasion:—

[1] Rot. Pat. i., 32, contains a writ of this kind, with the note: "Hoc breve de cetero erit de cursu." Even from Richard's reign we have "in quam ecclesiam nullam habet ingressum nisi per ablatorem suum." Rot. Cur. Reg., i., 391.

"*Incipiunt Brevia de Causa Regali.*"

1. Writ of right with many variations. (CA. 1.)

2. Writ of right *de rationabili parte.* (CA. 2)

3. *Ne injuste vexes.* (CA. 26.)

4. *Præcipe in capite.* (CA. 3.)

5. Little writ of right *secundum consuetudinem manerii.*

6. Writs of peace when tenant has put himself on grand assize. (CA. 5.)

7. Writ summoning electors of grand assize, with variations. (CA. 6.)

8. [1] Writ of peace when tenant of gravelkind has put himself on a jury in lieu of grand assize, and writ for the election of such a jury.

9. *Pone* in an action begun by a writ of right. (CA. 4.)

10. [2] *Mort d'ancestor,* with limitation "*post primam coronacionem Ricardi avunculi nostri.*" (CA. 16.)

11. *Quod permittat* for pasture in the nature of Mort d'ancestor, with a variation for a partible inheritance.

12. *Nuper obiit.*

13. [3] Novel Disseisin, with limitations "*post ultimum reditum J. Regis patris nostri de Hibernia in Angliam.*" (CA. 14.) Novel Disseisin of pasture. (CA. 15.)

14. [4] Assizes of Nuisance: some being vicontiel, with limitation "*post primam transfretacionem nostram in Britanniam.*" (CA. 55.)

15. Surcharge of pasture. (CA. 20.)

16. *Quo jure* for pasture.

17. Attaint in *Mort d'ancestor* and Novel Disseisin. (CA. 50).

18. Perambulation of boundaries.

19. [5] Writ of Escheat: claimant being entitled under a fine which limited land to husband and wife and the heirs of their bodies, the husband and wife having died without issue.

20. Darrein presentment. (CA. 40.)

21. Writ of right of advowson. (CA. 42.) A curious variation ordering a lord to do right touching an advowson; the writ is marked "*alio modo sed raro.*"

22. *Quare impedit.* (CA. 52.)

23. Prohibition to Court Christian touching advowson. (CA. 41.)

24. Attachment against judges for breach of such prohibition (B. 45.)

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[1] The privilege of having a jury instead of a grand assize was granted to the Kentish gavelkinders in 1232. Statutes of the Realm, I., 225.

[2] The form seems older than 1237.

[3] This form seems older than 1237.

[4] This form seems newer than 1237.

[5] This is called a Writ of Escheat; but it closely resembles the Formedon in the Reverter of later times.

25. *Ne admittas personam.*

26. Mandamus to admit parson. (CA. 43.)

27. Dower *unde nihil habet.* (CA. 46.)

28. Dower *ad ostium ecclesiæ.*

29. Dower in London. (CA. 48.)

30. Dower against deforceor.

31. Writ of right of dower.

32. *Warrantia cartæ.* (CA. 10.)

33. *De fine tenendo:* a fine has been made "*tempore J. Regis patris nostri.*" (CA. 51.)

34. *Juris utrum* for the parson. (CA. 49.)

35. *Juris utrum* for the layman. (CA. 49.)

36. Entry, the tenant having come to the land *per* a villan of the demandant.

37. Entry *ad terminum qui preteriit:* the tenant having come to the land *per* the original lessee. (CA. 11.)

38. Entry, the tenant having come to the land *per* one who was guardian.

39. Entry *cui in vita.* (CA. 12.)

40. Entry, the land having been alienated by dowager's second husband.

41. Entry sur intrusion.

42. Entry *ad terminum qui preteriit* for an abbot, the demise having been made by his predecessor.

43. Entry *sine assensu capituli.*

44. Escheat on death of bastard.

45. Entry sur disseisin for heir of disseisee, the defendant being the disseisor's heir.

46. Entry when the land has been given *in maritagium.*

47. Entry for lord against guardians of tenant in socage who are holding over after their ward's death without heir.

48. Entry for reversioner under a fine.

49. Writ of intrusion.

50. *Quod capiat homagium.* (CA. 13.)

51. False imprisonment: "*ostensurus quare predictum A. imprisonavit contra pacem nostram.*"

52. Robbery and rape: "*ostensurus de robberia et pace nostra fracta,* vel *de raptu unde eum appellat.*" (CA. 22.)

53. Homicide: "*attachiari facias B. per corpus suum responsurus A. de morte fratris sui unde eum appellat.*" (CA. 23.)

54. *De homine replegiando.* (CA. 24.)

55. *De plegiis acquietandis:* "*justifices talem quod . . . acquietet talem.*" (B. 32.)

56. *De plegio non stringendo pro debito:* do not distrain pledge while principal debtor can pay. (CA. 32 a.)

57. *Quod permittat* for estovers: "*justifices A. quod . . . permittat B. rationabilem estoverium suum in bosco suo quod in eo habere debet et solet.*" Variation for right to fish: "*justifices A. quod permittat B. piscariam in aqua tali quam in eadem habere debet et solet.*" (CA. 57.)

58. Debt: "*justifices A. quod . . . reddat B. xij. marcas quas ei debet,*" vel "*catallum ad valenciam xii. marcarum quas* (sic) *ei injuste detinet sicut racionabiliter monstrare poterit quod ei debeat, ne amplios,*" etc. (CA. 27.)

59. Debt and Detinue before the king's justices. "*Precipe A. quod . . . reddat B. xij. marcas quas ei debet et injuste detinet* vel *cattallum ad valenciam x. marcarum quod ei detinet, et nisi fecerit . . . summone . . . quod sit coram justiciariis nostris . . . ostensurus quare non fecerit.*"

60. Replevin. (CA. 21.)

61. Suit to mill: "*justifices A. quod faciat B. sectam ad molendinum . . . quam facere debet et solet.*" (CA. 58.)

62. Customs and services: "*non permittas quod A. distringat B. ad faciendum sectam . . . vel alias consuetudines et servicia que de jure non debet nec solet.*"

63. Customs and services: sheriff is not to distrain B. for undue suit to county or hundred court, etc.

64. Customs and services: "*jutifices A. quod . . . faciat B. consuetudines et recta servicia, que ei facere debet,*" etc. (CA. 25.)

65. Customs and services, by *precipe:* "*precipe A. quod faciat B. consuetudines et recta servicia.*"

66. Waste: "*non permittas quod A. faciat vastum . . . de domibus . . . quas habet in custodia,* vel *quas tenet in dotem,*" etc.

67. Waste: attach A. to answer at Westminster why he or she has wasted tenements held in guardianship or in dower, "*contra prohibicionem nostram.*" (Hib. 51.)

68. [1]*De nativo habendo:* let A. have B. and C. his "natives" and fugitives who fled since the last return of our father King John from Ireland. (CA. 17.)

69. *De libertate probanda.* (CA. 18.)

70. *De racionabilibus divisis.* (CA. 19.)

71. *De recordo et racionabili judicio.* Let A. have record and reasonable judgment in your county court in a writ of right. (CA. 7.)

[1] This form seems newer than 1237.

72. Annuity: "*justifices A. quod . . . reddat B. x. sol. quos ci retro sunt de annuo redditu,*" etc.

73. *Ne vexes.* Do not vex, or permit to be vexed, A. or his men contrary to the liberties that he has by our or our ancestor's charter, which liberties he has used until now. (CA. 56.)

74. Wardship in socage: "*justifices A. quod . . . reddat B. custodiam terre et heredis C.,*" etc. (CA. 53.)

75. Wardship in chivalry, the guardian claiming the land: "*justifices,*" etc. Variation when the guardian is claiming the heir's person. (CA. 54.)

76. Aid to knight son or marry daughter: "*facias habere A. racionabile auxilium.*" (CA. 34.)

77. Covenant: "*justifices A. quod . . . convencionem . . . de tanto terre.*" (CA. 36.)

78. Sheriff to aid in distraining villans to do their services.

79. Prohibition against impleading A. without the king's writ. "*R. vic. sal. Precipimus tibi quod non implacites nec implacitari permittas A. de libero tenemento suo in tali villa sine precepto nostro vel capitalis nostri justiciarii.*"

80. *Ne qui simplacitetur qui vocat warrantum qui infra aetatem est.* (CA. 9.)

81. *Ne quis implacitetur qui infra aetatem est.* (CA. 9.)

82. *Quod permittat:* "*justifices A. quod . . . permittat B. habere quendam cheminum,*" etc., vel "*habere porcos suos ad liberam pessonam,*" etc.

83. Account: "*justifices talem quod . . . reddat tali racionbilem compotum suum de tempore quo fuit ballivus suus,*" etc.

84. Mesne: "*justifices A. quod . . . acquietet B. de servicio quod C. exigit ab eo . . . unde B. qui medius est,*" etc. (CA. 33.)

85. *De excommunicatis capiendis.* (CA. 35.)

86. Prohibition to ecclesiastical judges against holding plea of chattels or debt "*nisi sint de testamento vel matrimonio.*" (CA. 30.)

87. Prohibition to the party in like case.

88. Attachment on breach of prohibition. (CA. 31.)

89. Prohibition in cases touching lay fee. (CA. 28.)

90. *Recordari facias,* a plea by writ of right in your county court.

91. [1] *Quare ejecit infra terminum. Breve de termino qui non preteriit factum per W. de Ralee:* "*Si A. fecerit te securum,* etc. . . *summone,* etc., *B.* etc., *ostensurus quare deforciat A. tantum terre . . . quam D. ei demisit ad terminum qui nondum preteriit*

[1] Bracton, f. 220, notices this writ as a newly invented thing. He recommends, however, another form, which is a Precipe quod reddat; but the above is the form which ultimately prevailed. Reg. Brev. Orig., f. 227.

infra quem terminum predictus (D) terram illam predicto B. vendidit occasione cujus vendicionis predictus B. ipsum A. de terra illa ejecit ut dicit," etc.

92. [1] "*Breve novum factum de communi assensu regni ubi de morte antecessorum deficit.*" This is the writ of cosinage.

93. *De ventre inspiciendo.*

94. [2] "*Novum breve factum per W. de Ralee de redisseisina super disseisinam et est de cursu.*" Sheriff and coroners are to go to the land and hold an inquest, and if they find a redisseisor to imprison him.

95. [3] "*Novum breve factum per eundem W. de averiis captis et est de cursu.*" After a replevin and pending the plea, the distrainor has distrained again for the same cause . . . "*predictum A. ita per misericordiam castiges quod castigacio illa in casu consimili timorem prebeat aliis delinquendi.*"

96. "*De attornato faciendo in comitatibus, hundredis, wapentachiis de loquelis motis sine breve Regis.*" A writ founded on cap. 10 of the Statute of Merton. Variation when the suit was due to a court baron.

97. Prohibition to ecclesiastical judges in a suit touching tithes.

98. Writ directing the reception of an attorney in an action. (CA. 37.)

99. *Precipe in capite.* (CA. 3.)

100. Writs directing sheriff to send knights to view an essoinee and hear appointment of attorney. (CA. 38, 39.)

101. Writ to the bishop directing an inquest of bastardy, the plea being one of "general bastardy."

102. Writ of entry sur disseisin, the defendant having come to the land *per* the disseisor.

103. *Quod permittat* for common by heir of one who died seised.

104. *Quare duxit uxorem sine licencia. Quare permisit se maritari sine licencia.*

105. [4] *Monstraverunt,* for men of ancient demesne.

106. Removal of plea from court baron into county court on default of justice.

107. Surcharge of pasture; "*summone* . . . B. *quod sit* . . . *ostensurus quare superhonerat pasturam.*" (CA. 20.)

108. Patent appointing justices to take an assise.

109. Prohibition to ecclesiastical judges against entertaining a cause in which B. (who has been convicted of disseising A.) complains that A. has "defamed his person and estate."

[1] Another of Raleigh's inventions, which we may ascribe to the year 1237. Bracton's Note Book, pl. 92.

[2] Given by Stat. Mert., cap. 3.

[3] This is given by Bracton, f. 159.

[4] This will hereafter be attracted into the "Writ of Right group" by the Little Writ of Right for men of the Ancient Demesne.

110. *De odio et hatia.*

111. Writ of extent. Inquire how much land A. held of us *in capite.*

112. Mainprise, where inquest *de odio et hatia* has found for the prisoner.

113. Writ of seisin for an heir whose homage the king has taken.

114. Writ of inquiry as to whether the king has had his year and a day of a felon's land.

115. *Warrancia diei,* sent to the justices.

116. Extent of land of one who owes money to the Jews.

117. Prohibition against prosecuting a suit touching advowson in Court Christian.

118. Writ to bishop directing an inquiry when bastardy has been specially pleaded: "*inquiras utrum A. natus fuit ante matrimonium vel post.*"

119. Writ announcing pardon of flight and outlawry.

120. Writ permitting essoinee to leave his bed. Dated A. R. 33.

121. Abbot of N. has been enfeoffed in N. by several lords who did several suits to the hundred court. You, the sheriff, are not to distrain the abbot for more suits than one "*quia non est moris vel juri consonum quod cum plures hereditates in unicum heredem descenderint vel per acquisicionem aliquis possideat diversa tenementa quod pro illis hereditatibus aut tenementis diversis, ad unicam curiam fiant secta diversa.*" Dated A. R. 43.[1]

Our first observation would be, that the Register has quite doubled in bulk since we last saw it; and our second should, as I think, be, that chronology has had something to do with the arrangement of the specimen that is now before us. The last two formulas are dated, and probably constituted no part of the Register that was copied, but were added to it, having been transcribed from writs lately issued. But leaving these two last formulas out of sight, I think that the last thirty writs or thereabouts are, for the most part, new writs tacked on by way of appendix to the older Register. The line might be drawn between No. 90 and No. 91. The latter of these, the very important *Quare ejecit infra teminum,* is expressly ascribed to William Raleigh, Bracton's master, whose judicial activity came to an end

[1] In 1258–9 suit of court was a burning question. The Provisions of Westminster (cap. 2) laid down the rule, that when a tenement which owes a single suit comes to the lands of several persons, either by descent or feoffment, one suit and no more is to be due from it. This writ deals with the converse case in which several parcels of land, each owing a suit to the same court, come into one hand, and it lays down the rule that in this case also one suit is to be due.

in 1239. Then, No. 92, the Writ of Cosinage, is "*breve novum*," and we know that this was conceded by a council of magnates in 1237, and was penned by Raleigh.[1] Then again, No. 94 is attributed to Raleigh. It is the Writ of Redisseisin, given by the Statute of Merton. The last of this group of "Actiones Raleghanæ" (if I may use that term) deals with the recaption of a distress pending the action of replevin; in spirit it is allied to the Redisseisin.[2] The next writ, No. 96, is given by the Statute of Merton. The prohibition in tithe suits, No. 97, is the centre of a burning question; and so is No. 118, the writ directing the bishop to say whether a child was born before or after the marriage of its parents. One may be surprised to find this writ at all, after the flat refusal of the bishops given at the Merton Parliament. Of the other writs in this part of the *Registrum*, we may, I think, say that they form an appendix, and are not too carefully made, since some of them appeared in the earlier part of the formulary. Others may be writs newly invented, or old writs that have only of late become "writs of course." The *Monstraverunt* for men of ancient demesne, a writ of critical importance in the history of the English peasantry, is no new thing; but very possibly, until lately, it could not be obtained until the matter had been brought under the king's own eye, or at least his chancellor's eye. The same may, perhaps, be said of the equally important *De odio et hatia*.

In the next place, we see one of the causes at work, which, in the course of time, swells the Register of Original Writs to its great bulk. A group of what we may call fiscal or administrative writs have obtained admission among the writs by which litigation is begun. At present it is small; it includes two writs for "extending" land, and a writ directing livery to an heir whose homage the king has taken; in course of time it will become large.

But turning to the formulas of litigation, we see already a large variety of writs of entry; though as yet the tale is not complete for writs "in the *post*" have not yet been devised, and would, perhaps, be resented by the feudal lords. The Assize of Mort

[1] Bracton's Note Book, pl. 1215.

[2] The printed Registrum, f. 86, says, "istud breve fuit inventum secundum provisiones de Merton." But the Provisions of Merton, as we have them, contain nothing but distress.

d'Ancestor is now supplemented by *Nuper obiit* and Cosinage. We see signs of growth in the department of Waste. We have something very like a Formedon. Annuity and Account have been added to the list of personal actions, but Trespass is yet lacking.

A few words about Trespass: The MS. registers that I have seen, fully bear out the opinion that has been formed on other evidence as to the comparatively recent origin of this action.[1] Glanvill has nothing that can fairly be called a writ of Trespass. His nearest approach to such a writ is "*Justicies*," ordering the sheriff to compel the return of chattels taken "unjustly and without judgment;" but the chattels have been taken in the course of a disseisin, and the plaintiff has already succeeded in an Assize.[2] In later days we do not find this writ; its object seems to have been obtained by the practice of giving damages in the Assize.[3] But already, in John's reign, we find a few actions which we may call actions of trespass. In some of these, where there has been asportation or imprisonment, the true cause of action in the royal court seems to be that which our forefathers knew as the "ve de naam;" "vetitum naami;" the refusal to deliver chattels or imprisoned persons upon the offer of a gage and pledge, — a cause of action which had definitely become a plea of the crown.[4] Also, it is in some instances a little difficult to distinguish an action of Trespass from an appeal of felony. Just the

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[1] I am happy in being able to refer to what is said on this point by "J. B. A." in HARVARD LAW REVIEW, ii., 292. [See also HARVARD LAW REVIEW, iii, 29. — ED.] Of course Trespass (transgressio) was well enough known in the local courts. "Trespass" and "Debt" were the two great heads of their civil jurisdiction.

[2] Glanv., xii., 18; xiii., 39.

[3] Bracton, f. 179 b. "Item ad officium (vicecomitis) pertinet quod faciat tenementum reseisiri de catallis, etc., quod hodie aliter observatur, quia quaerens omnia damna post captionem assisae recuperabit."

[4] Rot. Cur. Reg., ii., 34, "A. optulit se versus B. de placito transgressionis." Ibid., 51, "A. queritur quod B. vi sua asportavit bladum de sex acris terre quas disracionavit in curia Dom. Regis (but here the recovery of the land in the king's court is a special reason for its interference). Ibid., 120, "A. queritur quod B. dominus suus cum vi et armis prostravit boscum et cum forcia frequenter asportat ad domum suam, et quadrigas suas cum forcia in bosco suo de W. capit et adhuc unam illorum habet et detinet injuste." Ibid., 169, "A. queritur quod B. et C. intraverunt in terram suam de X. vi et armis et in pace Regis et averia sua ceperunt et ten" (*corr.* contra.) "vadium et plegium tenuerunt." Ibid., 260, "A. queritur quod Episcopus Donelmensis cepit eum et imprisonavit et eum retinuit injuste quousque ipsum redemit et eum contra vadium et plegium retinuit."

dropping out of a single word might make all the difference. Thus, on a roll of Richard's reign A. is said to appeal B., C., and D., for that they came to his land with force and arms, and in robbery ("felony" is not mentioned) and wickedly, and in the king's peace carried off his chattels, to wit turves; whereupon B. defends the felony and robbery, and says that he carried off the turves in question from his own freehold.[1] Attempts were made to use the appeal of felony as an action for trying the title to land, — a very summary action it would have been. But the court of John's reign would not suffer this.[2] On the rolls of the first half of Henry III.'s reign actions of Trespass appear, but they are still quite rare. The advantages of an action in which one can proceed to outlawry are apparent,[3] but something seems to be restraining plaintiffs from bringing it. The novelty of the procedure is shown by the uncertainty of the courts as to its scope, particularly when the action relates to land, and title is pleaded by the defendant. We actually find an action of trespass leading to a grand assize. If title is to be determined at all in such an action, it must be determined with all the solemnity appropriate to a Writ of Right.[4] Bracton, however, who unfortunately has left us no account of this action, shows a reluctance to allow this writ "*quare vi et armis*" to be used for the purpose of recovering land,[5] and a little later we find it repeatedly said that a question of title cannot be determined by such a writ.[6] So late as Edward

[1] Rot. Cur. Reg., i., 38.

[2] Selden Society, vol. 1, pl. 35, "appellum de pratis pastis non pertinet ad coronam regis."

[3] Bracton's Note Book, pl. 85.

[4] Rot. Cur. Reg., ii, 120, A. queritur quod B. dominus suus cum vi et armis prostravit boscum et cum forcia frequenter asportat ad domum suam . . . B. dicit quod A. non tenet vel tenere debet boscum illum de eo . . . A. ponit se in magnam assisam utrum ipse jus majus habeat tenendi de eo boscum vel ipse in dominico. Et B. similiter." Bracton's Note Book, pl. 835, "A. queritur quod B., C., et D. vi et armis et contra pacem Dom. Regis fuerunt in piscaria ipsius A. . . . et E. (vocatus ad warrantiam) venit . . . et dicit . . . quod ipse debet piscari in eadem piscaria cum ipso A., et dicit quod antecessores sui ibi piscari solent et debent et piscati sunt scil. tempore Henrici Regis avi. . . . A. dicit quod predecessor suus fuit seisitus de piscaria illa que fuit separabile suum . . . E. ponit se in magnam assisam."

[5] Bracton, f. 413.

[6] Placit. Abbrev. 142 (38 Hen. III.), "Et quia uterque dicit se esse in seisina de uno et eodem tenemento et non potest per hoc breve de jure tenementi inquiri." Ibid., 162 (1 Ed. I.), "Et quia liberum tenementum non potest per hoc breve de transgressione terminari."

II.'s reign it was necessary to assert against a decision to the contrary that in an action *de bonis asportatis* the judgment must be merely for damages and not for a return of the goods.[1]

But meanwhile, Trespass had become a common action. This, on the evidence now in print, seems to have taken place suddenly at the end of the "Baron's war." In the *Placitorum Abbreviato* we suddenly come upon a large crop of such actions for forcibly entering lands and carrying off goods, and in very many of these the writ charges that the violence was done "*occasione turbacionis nuper habitæ in regno.*" This may suggest to us that in order to suppress and punish the recent disorder, a writ which had formerly been a writ of grace, to be obtained only by petition supported by golden or other reasons, was made a writ of course, — an affair of every-day justice. Such MS. registers as I have seen seem to favor this suggestion. I have seen no register of Henry III.'s reign which contains a writ of Trespass, and it is not to be found even in all registers of his son's reign.

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[*To be continued.*]

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[1] Placit. Abbrev. 346 (17 Ed. II.), "In hujusmodi brevi de transgressione secundum legem," etc., "dampna tantum adjudicari et recuperari debeant."